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IN THE

Supreme Court of the United States

October Term, 1957.

No. 85

MICHAEL A. MATCZAK and ERNEST STANCICK, Individually and Jointly and Trading as TYLERSPORT GARAGE,

Petitioners,

ELISABETH M. BYRNE, Administratrix of the Estate of ALICE MORA, Deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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No.

MICHAEL A. MATCZAK AND ERNEST STANCICK, INDIVIDUALLY AND JOINTLY AND TRADING AS TYLERSPORT GARAGE,

Petitioners,

v.

ELISABETH M. BYRNE, ADMINISTRATRIX OF THE ESTATE OF ALICE MORA, DECEASED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED.

1. Should this Court grant certiorari when petitioners can point to no infringement of their basic rights to jury trial as guaranteed by the Seventh Amendment in a situation where a jury was permitted to separate overnight with clear and proper precautionary instructions by the trial Judge who received an affirmative avowal by each juror that he or she had not discussed the case with anyone when the jury reconvened the next morning and where, admittedly, petitioners are unable to point to any impropriety, undue influence or misconduct?

STATEMENT OF THE CASE.

This was a suit for damages for wrongful death commenced in the United States District Court for the Eastern District of Pennsylvania in which jurisdiction was based upon diversity of citizenship. The trial started on June 3, 1957, and the trial judge completed his charge to the jury shortly before 4:00 o'clock P. M., June 5, 1957 (R. 156a, 194a). After the Marshal was sworn (R. 194a), the jury was taken to the jury room and at 10:35 that evening had not yet arrived at a decision. The court repossessed certain interrogatories submitted to the jury, delivered them to the Clerk for safe keeping, released the Marshal from his oath (R. 199a) in the open Court room and instructed the jury to return at 10:00 o'clock A. M. on the morning of the following day. They were strictly instructed not to discuss the case with anyone in the interim. The petitioners objected to this procedure. The respondent agreed to it (R. 200a, 201a). The following morning each of the jurors were separately sworn and asked whether they had discussed the case directly or indirectly with anyone since they had left the courthouse at 11:00 o'clock the previous night. Each of the jurors answered, "No, Sir" (R. 203a, 204a). They were then sent to deliberate further. At 3:55 of that day the jury requested further instructions on a point relative to damages (R. 218a-222a). At 4:45 P. M. the jury reached a verdict for the respondent, having answered all fifteen of the interrogatories submitted by the court in conformity with their verdict for the respondent (R. 222a, et seq.).

Petitioners thereupon moved in the alternative for a judgment n. o. v. or for a new trial and assigned as grounds for a new trial, *inter alia*, the fact that the trial court had permitted the jury to disperse after it had commenced its deliberations. The District Court dismissed the motions

and held that decisional authority in the Federal Courts left this completely to his discretion (R. 303a).

On appeal, the Court of Appeals (CA 3) affirmed the decision of the District Court on the question of dispersal of the jury, merely modifying the damages in conformance with the law of Pennsylvania. The Court of Appeals ruled that the question of dispersal of the jury after the charge was a matter within the discretion of the trial judge, and that the solemn deliberation of the jury could not be upset in the absence of an abuse of discretion or a confirmed showing of misconduct or prejudice.

ARGUMENT.

1. Petitioners Have Failed to Show a Conflict of Authorities Which Would Justify the Granting of Certiorari.

In their Petition for certiorari, petitioners purport to show a dichotomy in decisional authority on the question of whether or not the mere separation of a jury after it has commenced its deliberations is violative of the 7th Amendment to the Constitution. If anything, the remarkable aspect of modern decisions on the question is the complete unanimity of opinion in all Anglo-American jurisdictions that in civil cases the separation of a jury after it has commenced its deliberations is a matter solely within the discretion of a trial Court and that a verdict rendered after such separation will not be set aside in the absence of an affirmative showing of misconduct. To counterbalance the clear statements contained in all of the modern cases and raise a conflict in authorities, petitioners rely on the case of *Lester v. Stanley*, Fed. Case No. 8277, 15 Fed. Cases 396 (C. C. Conn., 1808).

The "case" of *Lester v. Stanley, supra*, certainly constitutes no authority for the proposition that the separation of a jury in the absence of prejudice constitutes error. The issue was not involved there, nor was it ruled upon. That jury had not been permitted to separate during deliberations nor did any request such separation. Examination of that "case" reveals that the "authority" is merely a reported observation made by Mr. Justice Livingston while sitting as a trial Judge *after* his charge and *before* the jury was to retire. He remarked that it was his belief that it had been the practice in that state (Connecticut) for juries sometimes to separate after they had commenced deliberating. He then commented that a statute forbade such a practice and that this statute was in affirmance of the old rule at common law. Hence it is clearly no authority for petitioners' assertion that a conflict exists

which requires the granting of certiorari by this Court. The gratuitous dictum by way of a comment by the trial Court made in 1808, dealing with a local statute concerning a problem that did not exist in the case which he was then trying can have no relevance to the realities of modern jury trials or the back log of jury trial lists. It does not in any way vitiate the force of *all* modern decisional authority in this area, both Federal and State which consistently hold this to be a matter of discretion for the trial judge.

2. Petitioners Have Failed to Show That the Question Involved Is of Sufficient Importance to Require the Granting of Certiorari by This Court.

In their Petition for certiorari petitioners contend that the authoritative pronouncement by the District Court and the Court of Appeals in the instant matter constitutes a danger to our system of jury trials, arguing that *two* Circuit Courts have now passed on the question and others may follow their lead unless there be a definitive statement by this Court on the problem. Respondents believe petitioners' alarm to be completely unjustified. The black picture which they paint is completely belied by the actual posture of the law in this area. Actually six cases all supporting the trial judge here have uniformly been decided by the several U. S. Courts of Appeal. Under heading 7 of their brief, petitioners attempt to distinguish the many decisions from the different circuits all of which support the trial judge here, and seek to cast into discard those cases which contain similar pronouncements. Those cases certainly cannot be ignored as being irrelevant to this issue since they contain bold and forthright statements, that the mere separation of a jury in the absence of prejudice does not constitute grounds for a new trial. Especially is this true where petitioners can point to no single case to the contrary.

Petitioners have attempted to avoid the obvious import of three cases in this area (*Lucas v. United States*, 275 Fed. 405 (C. A. 8, 1921); *Brown v. United States*, 69 App. D. C. 96, 99, F. 2d 131 (1938); *Franklin v. Shelton*, 250 F. 2d 92 (C. A. 10, 1957)) on the theory that there was a waiver of any claim of error, either through express consent to separation, or through failure to enter an objection. Respondents are at a loss to see how these factors vitiate the conclusion universally arrived at by all of the Courts that the separation of a jury is a matter solely within the discretion of the trial Court. The Courts ignored the failure to object and decided this issue on the merits. An examination of those decisions will reveal that the operational factor in the Court's conclusion was not the failure of counsel to interpose an objection or consent. They held that under our modern practice, separation is one of the features of trial practice which lies in the discretion of the Court.

One case, *Walton v. Wild Goose Mining and Trading Co.*, 123 Fed. 209 (C. A. 9, 1903) is averred by petitioners to be inapplicable because it concerned a situation in which there was no separation of the jury. There was not only separation of the jury in that case, but allegations of the most flagrant improprieties. The Court said (p. 221):

> "In the absence of injury, a mere separation of the jury in civil cases, without the consent of the Court is not per se sufficient grounds for a new trial."

Petitioners seek to emasculate the force and effect of still another authoritative holding: *Guardian Fire Ins. Co. of Pennsylvania v. Central Glass Co.*, 194 Fed. 851 (C. A. 5, 1912) on the ground that there are not sufficient facts within the opinion to warrant its being considered authority in the instant situation. The statement of the Court, however, would appear to leave little room for doubt as to its position on this question (p. 853):

"The fourth Assignment of error relates to the separation of the jury before verdict, which was a matter wholly within the control of the Court below, and upon which no error can be predicated, unless based upon misconduct adversely effecting a fair trial . . . "

One case is squarely beyond any ingenious attempt to distinguish, for it presented a situation, which on its facts was even stronger than the instant case: *Liverpool and L. & G. Ins. Co. v. N. & M. Friedman Co.* 133 Fed. 713 (C. A. 6, 1904).

In that case the jury commenced its deliberations at about 2:00 o'clock on the afternoon of the day before Thanksgiving. No decision had been reached at 5:00 o'clock of that day and the trial Judge permitted the jury to go to their homes after cautioning them not to talk to anyone or permit anyone to talk to them about the case. The jury returned at 2:00 o'clock on the afternoon of the day following Thanksgiving and resumed their deliberations. The Court rejected a contention that the mere separation of the jury after submission of the case constituted error saying at page 716:

". . . did the mere separation of the jury after the submission of the case vitiate the verdict at common law? We are clear it did not. All the members of the jury lived outside Grand Rapids, where the fire occurred and the trial was held. No improper conduct on the part of any member of the jury during the separation was shown or charged. It is not claimed that the jury, or any member of it, was approached or tampered with, or in any way improperly influenced or prejudiced, by reason of the separation. Conceding that a new trial may properly be granted where it is shown that prejudice resulted from the separation, no occasion for the exercise of such power was shown in

this case. *Walton v. Wild Goose Mining Company*, 123 Fed. 209, 60 C. C. A. 155, 157; 12 Enc. Pl. Pr. 579, and cases cited *Thompson & Merriman on Juries*, Sections 310, 315, 316."

3. The Seventh Amendment Does Not Preserve This Aspect of the Jury Trial as it Existed at Common Law.

In urging upon this Court the proposition that the mere separation of a jury after it has commenced its deliberations is a fatal error, petitioners would have this Court freeze the form of jury trials in its medieval shape. This Court has consistently held that the Seventh Amendment, did not preserve jury trial as it existed in all of its aspects at common law, but guaranteed the basic institution of trial by jury only in its "most fundamental elements." *Galloway v. United States*, 319 U. S. 372, 63 S. Ct. 1077, (1943).

In determining whether or not separation is violative of the "fundamental elements" of the jury trial, resort to ancient authorities such as Blackstone is not particularly relevant. One doubts very much that even petitioners would contend that the Seventh Amendment preserved all of the ancient modes of jury procedure described in Blackstone. Indeed, when one reads the particular section of Blackstone dealing with the issue of jury separation, it becomes apparent that the whole concept of keeping the jury together without food, fire or water is a pure medieval concept totally unrelated to the essential rights inherent in trial by jury. Juries in civil cases everywhere separate for lunch and occupy heated jury rooms in their deliberations.

The English Courts when faced with the issue of whether or not separation of the jury after it commenced its deliberations was a fatal error, came to the conclusion that it was not one of the essential elements of trial by jury and further that, even at common law a jury was permitted to

separate after deliberating. *Fanshaw v. Knowles*, (1916), 2 K. B. 538, C. C. A.[1]

4. The Uniform Decisions of the Federal Courts in This Area Facilitate the Administration of Justice.

In our administration of justice, we are today concerned with expediting cases and at the same time preserving to litigants their fundamental rights. Ideally, it might be desirable to isolate jurors completely from the moment they are sworn to try a case until the time of their decision. Practical considerations, however, make it impossible to achieve this goal. Jurors are universally permitted to disperse during trial and are not isolated during those recesses. The realities of our modern system of justice make it impossible or impractical for reasons of expense and administration to keep the jury together at all times during the course of a trial. Precautionary instructions and general supervision by the Court are relied upon to keep the jury free from outside contamination.

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1. ". . . It appears, therefore, that the jury when they had once agreed could return an informal verdict called a privy verdict, and that when they had done that they were entitled to eat and drink, as is said in Coke upon Littleton, which was already a relaxation of the rigidity of the old rule; and in Blackstone's time he says that when they were agreed they gave their privy verdict in order to be delivered from their confinement. It seems, therefore, not only were they allowed to eat and drink if they had given their privy verdict, but in Blackstone's time they were no longer confined, and they could on the next morning, when they gave their public verdict, alter the privy verdict or affirm it as they pleased. Now that shows that when Blackstone's Commentaries were written it was clear that in civil trials juries were allowed to give a verdict after they had separated. The progress in the liberty afforded to juries is shown by the allowance of the release from confinement, which is stated in Blackstone, but not in Coke upon Littleton; and even in Coke upon Littleton a reference to the case of *Saunders v. Freeman* (1) shows that after there had been a privy verdict the jury were then allowed to eat and drink and lie together . . . .

. . . . On the whole consideration of these authorities indicates that this old rule had by custom gradually been relaxed until jurors were allowed to separate before giving their verdict in civil cases . . . (pages 544-545).

Similar problems are presented when the issue arises as to whether or not a jury should be permitted to disperse after it has received the case from the trial Court. We believe that the best solution to the problem is the one arrived at by the trial Court in the instant case and by the many other circuits which have passed upon the problem. The matter is one best left to the discretion of the trial Court which has the first hand view of the trial and the problems arising therefrom. It should be the instrumentality for balancing the equities. It alone can best appraise the dangers involved. Under the situation here, the decision of the trial Court was eminently sound and just. With the safeguards taken by the trial Court, the danger of outside contamination was minisculc.

Respondent is not urging upon this Court the proposition that separation ought to be indulged in in every case, nor is it contended that frequent separation is desirable. On the contrary, respondent agrees that separation should be permitted only in such situations where the trial Court believes that separation is necessary to reach a just disposition of the case before it. The Law's delays should not be encouraged or abetted. In permitting separation, the Court should take proper precautionary measures to safeguard the jury from outside influences. All such measures were taken in the instant case. *The petition does not suggest that any misconduct took place in this case during the jury separation.*

5. The Overwhelming Weight of Authority in the State Courts Supports the Rule of Separation.

While decisions in State Courts are not controlling in this area, respondent believes them to be highly relevant. State Courts are faced with the same problems of administering justice and at the same time preserving to litigants their basic constitutional guarantees of trial by jury. In-

deed, many State Constitutions contain provisions similar in nature to the Seventh Amendment.

The overwhelming weight of authority in State decisional authorities supports the position of respondent. It has been universally held that the mere separation of a jury after it has commenced its deliberations, unaccompanied by misconduct or undue influence, is not fatal per se. *McGill v. Alabama Fuel and Iron Co.*, 221 Ala. 614, 130 S. 379 (1930); *United Verde Copper Co. v. Kovacovich*, 42 Ariz. 159, 22 Pacific 2d 1085 (1933); *Dziegiel v. Town of Westford*, 274 Mass. 291, 174 N. E. 495 (1931); *Edgerton v. Lynch*, 225 Mich. 456, 238 N. W. 322 (1931); *McDowd v. Pig'n Whistle Corp.*, 26 Cal. 2d 696, 160 P. 2d 797 (1945); *Porret v. City of New York*, 252 N. Y. 208, 169 N. E. 280 (1929).

6. The Common Law Practice of the "Sealed Verdict" Does Not Support the Petitioners.

Petitioners reason that the practice of sealing a verdict supports their position since after sealing, if one juror disagrees, the jury is discharged rather than permitted to resume its deliberations as there would be a presumption of tampering. *Kramer v. Kister*, 187 Pa. 227, 40 Atl 1008 (1898).[2]

We believe the practice of the sealed verdict to be one of the commonest illustrations of a situation in which separation of the jury after deliberation had been given approval. Indeed, the English Courts reasoned that separation was permitted at common law because the procedure of the sealed verdict was utilized at common law. (See *Fanshaw v. Knowles*, (1916), 2 K. B. 538, C. C. A.)

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2. But cf. *Porret v. City of New York*, *supra*, where Cardozo, J. approved the practice of resubmitting a case to a jury after disagreement following the sealing of a verdict and dispersal overnight.

It is well established that the sealed verdict is not the verdict of the jury. It is only the verdict which is announced in open Court which controls. *California Fruit Exchange v. Henry*, 89 F. Supp. 580 (D. C., W. D. Pa., 1950). In every situation where a jury finds a sealed verdict, by definition they have been permitted to separate before rendering the final verdict.

The Pennsylvania Supreme Court had the occasion at a later date to review the practice of the sealed verdict, commented on in *Kramer v. Kister, supra*, relied on by petitioners in their brief. In the case of *Eastley v. Glenn*, 313 Pa. 130, 169 A. 433 (1933), the Pennsylvania Supreme Court pointed out that while ". . . historically, it was the practice to compel juries to remain together until their verdict was announced. Convenience and the demands of modern life have caused a change in this custom." While the practice was not to be indulged in, in every case, jury separation is not per se a fatal error *in the absence of affirmative misconduct.*

CONCLUSION.

Petitioners have failed to present a question meritorious enough to warrant the granting of certiorari by this Court. They make no claim of misconduct by the jury. All modern decisional authority supports the proposition that the question of the separation of a jury after charge is a matter resting within the discretion of the trial Court and in the absence of abuse of discretion or actual impropriety, separation of itself is not grounds for setting aside a solemn jury deliberation. Such a rule facilitates the administration of our modern system of justice. In the meantime, petitioners have indulged themselves in myriad grounds for new trial all delaying the enforcement of a jury verdict rendered because of their callous negligence resulting in the death of a young mother and wife. They now ask this

Court to review an issue repeatedly held to be without merit relying on an ancient technicality that in no way facilitates the administration of justice. Therefore, the petition should be dismissed.

Respectfully submitted,

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